Chapter XVII

CONCLUSION AND RECOMMENDATIONS FOR THE FUTURE

This report concludes the Medical Board of California Enforcement Program Monitor project mandated by SB 1950 (Figueroa) and Business and Professions Code section 2220.1.

This report and the Monitor's November 2004 *Initial Report* have documented the Monitor's analysis of the MBC enforcement program and her efforts to fulfill the statutory mandate to "reform and reengineer . . . the board's enforcement program and operations and . . . improve . . . the overall efficiency of the board's disciplinary system."[359]

The Monitor finds that major reform of MBC's enforcement program has successfully begun and significant improvements in the efficiency of the Board's disciplinary system have been and are being achieved — all as the result of the collaborative efforts of a broad coalition of stakeholders. Further, the Monitor believes that the long-term prospects for reform and further improvement are excellent.

Faced with daunting challenges in resources, structure, and process, the Medical Board and its enforcement partner, the Health Quality Enforcement Section of the Attorney General's Office, have enthusiastically embraced almost all of the Monitor's 65 recommendations for the reform of this disciplinary program, and the initial fruits of this effort are praiseworthy. Through the combined efforts of the Medical Board, its staff, HQE management and staff, the Legislature, and numerous public and private participants, the following reforms and improvements have been realized:

- MBC will soon benefit from a 30% increase in operating revenues to dramatically boost enforcement program resources.

- The vertical prosecution system, which is the modern paradigm for complex regulatory casework of this kind, will be employed by MBC and HQE staff working together in case teams, starting January 1, 2006.

[359] Bus. & Prof. Code § 2220.1(c)(1).

■ MBC's processes for gathering medical records and obtaining physician interviews — important contributors to overall case processing delays — have been streamlined and strengthened, and these delays are already on the decline.

■ Timely exchange of expert opinions in MBC administrative actions will soon be the rule, increasing informed case evaluation and earlier case disposition.

■ Enforcement operations manuals and training efforts have been extensively updated and enhanced.

■ The Central Complaint Unit's structure and process have been improved, and overall complaint processing cycles have dropped by 16% already.

■ The Board's Diversion Program has undergone a dramatic change in management and direction with the stated intent of "reconstructing" the program to better protect the public, and significant operational improvements have been implemented despite continuing resource shortages.

■ The long-overdue study of the peer review process will soon commence, and will hopefully identify ways in which Business and Professions Code section 805 should be amended to guarantee that MBC receives important information about physician incompetence and misconduct.

■ MBC's program of public disclosure of physician information to improve informed consumer choice has been upgraded and will now be reevaluated by a respected oversight agency.

The matrix below, which summarizes the status of the Monitor's 65 recommendations, demonstrates that MBC, HQE, and the Legislature have implemented (in whole or in part) or will soon implement 50 of the Monitor's 65 recommendations, and others are under active consideration.

Monitor Recommendation	Status
1. Reinstate lost enforcement positions	**To be implemented**: To follow the budget augmentation in SB 231 (§17).
2. Increase license fees	**Implemented**: SB 231 amends BPC §2435 to increase initial and biennial renewal fees to $790 (§17); authorize MBC to increase fees to compensate for the loss of cost recovery revenue (§17); and authorize MBC to further increase fees if its investigators are transferred to HQE (§19).

Monitor Recommendation	Status
3. Upgrade management information systems	**Partially implemented**: MBC is studying MIS improvements with DCA; ProLaw is now in use at HQE; the Diversion Tracking System was overhauled as of July 1, 2005.
4. Update and/or rewrite MBC enforcement manuals; HQE must draft a policy/procedure manual	**Partially implemented**: Most MBC manuals have been rewritten or updated; an overhaul of the *Diversion Manual* is under way; HQE and MBC staff are planning a joint operations manual implementing vertical prosecution.
5. Revise CCU statistics; discontinue counting NOI/NPDB/ change of address citations as complaints	**Implemented**: New statistics are reflected in MBC's *2004–05 Annual Report*.
6. Repeal "notice of intent" filing requirement (Code of Civ. Proc. §364.1)	**Implemented**: SB 231 (§20).
7. Revise and enforce firm policy on medical records procurement	**Implemented**: CCU revised its procedure manual to emphasize deadlines on records requests; the average timeframe to receive medical records has been reduced from 66 days to 48 days. SB 231 amends BPC §2225 to permit use of cite/fine authority for medical records violations (§13).
8. Expand role of HQE attorneys in CCU to assist with medical records procurement and mandatory reporting issues	**To be implemented**: The half-time DAG assigned to CCU has been unavailable since May 2005; DOJ plans to assign a full-time DAG to CCU following the budget augmentation in SB 231 (§17).
9. Revisit implementation of "specialty review" requirement of BPC §2220.08	**Implemented**: MBC staff developed a protocol for the use of qualified alternative expert reviewers.
10. Amend BPC §2220.08 to exempt from specialty review cases of pending investigation, accusation, probation	**Implemented**: SB 231 amends §2220.08 to exempt from the specialty review requirement complaints against physicians who are under investigation, the subject of an accusation, or on probation (§12).
11. Stakeholder reconsideration of BPC §2220.05 mandatory case processing priorities	Staff is studying the impact of the priorities statute on process. No consensus yet on the impact or need for change.
12. Seek legislation imposing penalties on insurers/employers for failure to comply with BPC §801/801.1 reporting requirement	No consensus yet; would require legislation.
13. Require physician self-reporting of misdemeanor criminal convictions	**Partially Implemented**: SB 231 requires self-reporting of substantially-related misdemeanor convictions, once MBC presents and the Legislature enacts a list of such crimes (§5).
14. Educate coroners about reporting requirements of BPC §802.5	**Implemented**: Information letters were sent to coroners and a presentation was made at the coroners' September 2005 annual conference.

Monitor Recommendation	Status
15. DCA educational program for court clerks regarding importance of compliance with BPC §800 reporting requirements of criminal convictions and civil judgments	**To be implemented**: DCA drafted an article for publication in Judicial Council newsletter and a "universal reporting form" enabling court clerks to report any DCA licensee. To supplement court clerk reporting, SB 231 amends BPC §802 to require physicians to self-report civil judgments in any amount (§4).
16. Fund peer review study authorized in SB 16 (Figueroa) (2001)	**Implemented**: SB 231 amends BPC 805.2 to mandate completion of the study by July 1, 2007 (§6).
17. Ban gag clauses in civil settlements involving regulatory agency licensees	AB 446 (Negrete McLeod) would have prohibited regulatory gag clauses in civil settlements. Vetoed.
18. Revisit staffing of CCU sections; cross-train Physician Conduct analysts to handle urgent PC complaints	**Implemented**: One analyst was transferred from the QC section to the PC section and assigned to handle urgent PC complaints.
19. Institute review of "simple departures" in Physician Conduct cases	**Implemented**: CCU now audits PC cases closed due to "simple departure" for possible repeated negligent acts.
20. Ensure notification of subject physicians when complaints are closed	**Implemented**: CCU drafted new closure letters and updated the Web explanation of the enforcement process; MBC revised EOM provisions to require notice of case resolution.
21. CCU should ensure policy/procedure manuals are updated	**Implemented**: CCU manuals have been and will continue to be revised as changes occur.
22. Implement the vertical prosecution model at MBC and HQE	**To be implemented**: SB 231 requires a vertical prosecution model featuring joint assignment of a DAG and an investigator at the commencement of the investigation. MBC and HQE are implementing this system in two-staged process. A report is due July 1, 2007; the sunset date is July 1, 2008 (§§8, 24–29).
23. Revise and enforce a firm policy on medical records procurement	**Implemented**: MBC revised EOM §6.14 to set new deadlines and require personal service of requests for medical records. The average timeframe to receive medical records was reduced from 74 days to 44 days. SB 231 amends BPC §2225 to permit the use of cite/fine authority for medical records violations (§13).
24. Develop and enforce a new policy on physician interviews	**Implemented**: MBC revised EOM §6.2 to set new deadlines for interviews and require tape-recording.
25. Improve cooperation, relationships, and case referrals to state and local prosecutors	**Implementation ongoing:** MBC staff participate in CDAA meetings and annual conferences, and engage in outreach to variety of law enforcement agencies.
26. Restore lost investigative resources to provide for special projects and teams	**To be implemented**: To follow budget augmentation in SB 231 (§17).

Monitor Recommendation	Status
27. Improve and regularize investigator training	**Partially implemented:** Multiple training programs were provided in 2005; reinstatement of the training supervisor position is anticipated after the SB 231 fee increase.
28. Expand and improve the medical consultant program	**To be implemented:** Increased medical consultant hours and training are planned after SB 231 fee increase.
29. Improve investigator access to law enforcement information systems	MBC staff is studying available systems and costs; may be implemented after SB 231 fee increase.
30. Require mutual expert witness information exchange well in advance of the hearing	**Implemented:** SB 231 adds new BPC §2334, which requires parties to exchange written expert information 30 days in advance of the hearing, and provides for OAH rulemaking to implement the procedure (§14).
31. Improve medical expert recruitment and utilization	**Implemented**: In-person training sessions for expert reviewers were reinstated; additional outreach was targeted to reviewers in needed specialties.
32. Increase expert witness compensation	Under consideration; increased compensation possible with SB 231 fee increase.
33. Implement the vertical prosecution model at MBC and HQE	**To be implemented**: SB 231 requires a vertical prosecution model featuring joint assignment of a DAG and an investigator at the commencement of the investigation. MBC and HQE are implementing this system in two-staged process. A report is due July 1, 2007; the sunset date is July 1, 2008 (§§8, 24–29).
34. Revise and enforce a firm policy on medical records procurement	**Implemented**: MBC revised EOM §6.14 to set new deadlines and require personal service of requests for medical records. HQE publicized policy changes and increased enforcement actions. SB 231 amends BPC §2225 to permit the use of cite/fine authority for medical records violations (§13).
35. Restore lost HQE attorney positions	**To be implemented:** To follow budget augmentation of SB 231 (§17).
36. Increase coordination with state and local prosecutors and use of PC §23 mechanism	**Partially implemented:** MBC staff meet regularly with local prosecutors via CDAA; PC §23 filings have decreased due to *Gray* decision.
37. Increased use of ISO and TRO filings	**Implemented**: MBC/HQE motions for ISO/TRO increased by 50% in 2004–05. The vertical prosecution system required by SB 231 may identify more ISO/TRO matters.
38. Develop an HQE policy and procedure manual	**To be implemented**: AG staff is reviewing MBC EOM and has begun work on an HQE operations manual for vertical prosecution required by SB 231.

Monitor Recommendation	Status
39. Amend Gov't Code §11508 to limit hearing venue to four major OAH locations in most cases	**Implemented**: SB 231 amends §11508 to regulate venue and the process for selecting or changing venue (§22).
40. DMQ should engage in public dialogue on the value of DMQ review of proposed decisions and stipulations	Considered by Enforcement Committee in April 2005; deferred.
41. Make use of precedential decision authority under Gov't Code §11425.60	**Implementation ongoing**: DMQ staff is continuously assessing decisions for potential designation as "precedential."
42. DMQ should address procedural issues relating to requests for stay of effective date of disciplinary actions	MBC staff is clarifying criteria to guide its decisions on motions for stay.
43. Repeal Gov't Code § 11371(c) publication requirement	**Implemented**: SB 231 repeals §11371(c) (§21).
44. Revise policy to ensure notification of defense counsel when DMQ rejects stipulated settlements	**Implemented**: §32 of DCU manual was revised to require notice to both counsel when DMQ rejects a stipulation.
45. Amend BPC §2230(b) to reflect the addition of two new members to DMQ	**Implemented**: SB 1111 revises the statute to reflect correct DMQ panel membership (§27).
46. Amend BPC §2019 to require challenges to MBC disciplinary decisions to be instituted in the forum closest to the location of the administrative hearing	Earlier versions of SB 231 included an amendment to §2019; the final version does not address this issue.
47. Amend Gov't Code §11523 to require petitioner to pay the full cost of a hearing transcript.	**Implemented**: SB 231 requires petitioner to pay the full cost, but preserves the right of reimbursement and *in forma pauperis* rights (§23).
48. Revise BPC §§2027 and 803.1 to eliminate redundancies, inconsistences, and errors in MBC's public disclosure statutes	**Partially implemented**: SB 231 clarifies MBC authority to post prior disciplinary actions (§11); it also requires the Little Hoover Commission to study public disclosure issues by July 2008 (§10).
49. Disclose medical malpractice settlements exceeding $30,000	**Partially implemented**: SB 231 requires the Little Hoover Commission to study public disclosure issues by July 2008 (§10).
50. Disclose all misdemeanor criminal convictions substantially related to MD qualifications, functions, and duties	**Partially Implemented**: SB 231 requires MBC disclosure of substantially-related misdemeanor convictions, once MBC presents and the Legislature enacts a list of such crimes (§5).
51. Disclose all significant terms and conditions of public probation orders on MBC's Web site	**Implemented**: A new "enforcement public document search" feature was added to MBC Web site in November 2004; public documents are being added continuously.
52. Amend §2027 to permit MBC to disclose resignation or surrender of privileges following notice of impending peer review investigation	**Partially implemented**: SB 231 requires the Little Hoover Commission to study public disclosure issues by July 2008 (§10).
53. Require physicians to inform patients about MBC, its jurisdiction, and contact information	No consensus on the need for action.

Monitor Recommendation	Status
54. MBC should notify subject physicians of complaint dispositions	**Implemented**: MBC revised EOM and CCU manuals to require notice of complaint closure.
55. Educate county medical societies about their obligations under Civil Code §43.96	**Implemented**: MBC staff contacted county medical societies and reviewed Web sites, and found substantial compliance with the requirement.
56. Reevaluate basic concept of diversion as means of public protection	**Implementation deferred** until the operational deficiencies of the Diversion Program are addressed; then the Diversion Committee will study longstanding policy issues. SB 231 requests a full performance audit of the Program by July 1, 2007 (§15), and sunsets the Program on July 1, 2008 (§16).
57. Reevaluate whether diversion should be an MBC in-house function or contracted to a private entity	**Implementation deferred** until the operational deficiencies of the Diversion Program are addressed; then the Diversion Committee will study longstanding policy issues. SB 231 requests a full performance audit of the Program by July 1, 2007 (§15), and sunsets the Program on July 1, 2008 (§16).
58. If the Diversion Program remains with MBC, implement comprehensive overhaul of the program to correct deficiencies	**Partially implemented**: New Program staff was added and some operational deficiencies have been addressed; the Diversion Committee will study longstanding policy issues. SB 231 requests a full performance audit of the Program by July 1, 2007 (§15), and sunsets the Program on July 1, 2008 (§16).
59. Abolish the Liaison Committee to the Diversion Program as it currently exists and restructure it to meet the needs of the Program and DMQ	Implementation to be considered by Diversion Committee in late 2005/early 2006.
60. Determine if the Diversion Program should be capped at a maximum number of participants that staff can adequately monitor	**Implementation deferred** until the operational deficiencies of the Diversion Program are addressed; then the Diversion Committee will study longstanding policy issues.
61. Separate the Diversion Program budget and implement means to supplement the budget	**Partially implemented**: SB 231 requires the Diversion Program Manager to separately account for expenses/revenues of the Program on a quarterly basis (§15).
62. Establish consistent and enforceable standards for participation in and termination from the Program	**Implementation deferred** until the operational deficiencies of the Diversion Program are addressed; then the Diversion Committee will study longstanding policy issues.
63. Explore methods of assessing long-term Program effectiveness	**Implementation deferred** until the operational deficiencies of the Diversion Program are addressed; then the Diversion Committee will address longstanding policy issues.
64. Improve or replace the Diversion Tracking System	**Implemented**: MBC's Information Systems Branch replaced DTS with a new system on July 1, 2005.

Monitor Recommendation	Status
65. Required performance audit of Diversion Program	**Partially implemented**: SB 231 (§1 intent language) requests the Joint Legislative Audit Committee to assign the Bureau of State Audits to complete a performance audit of the Diversion Program by June 30, 2007.

The Monitor applauds the commitment to improvement and the gratifying efforts to bring about that change by the Medical Board, HQE, the Legislature, and many other stakeholders, as reflected in the matrix above. However, as documented elsewhere in this *Final Report*, a great deal of work remains before the Medical Board's enforcement program fulfills its potential as a model of public protection. At the conclusion of each substantive chapter, this *Final Report* contains recommendations for future consideration and action by MBC, HQE, and the Legislature. Some of the most important recommendations include the following:

■ ***Full and immediate access to new enforcement program resources*** should be the Board's highest priority. The 30% fee increase will generate vital new funding for replacement of lost staff, improvements to services and equipment used, and resources otherwise needed to shorten case processing times. Every effort should be made to secure the earliest possible control agency approvals for authorization to use these new resources as they were intended by the Legislature.

■ ***Full and effective implementation of the vertical prosecution system***, ultimately resulting in the transfer of MBC's investigators to HQE after 2007 — including the following:

- prompt development of operating protocols and implementation of the case team process mandated by SB 231;

- rapid retraining of MBC and HQE staff in new vertical prosecution procedures;

- drafting and distribution of a jointly-developed operations manual guiding the MBC and HQE staff in the new vertical prosecution process. Development of a single operations manual guiding the joint investigation and prosecution of MBC disciplinary matters is an essential step toward successful implementation of the vertical prosecution system to be used starting January 1, 2006; and

- expanded use of ProLaw by HQE to maximize its ability to effectively manage MBC's caseload, and the earliest feasible shift-over to the ProLaw system by MBC investigators and supervisors to permit the development of a jointly-operated

management information system unifying the data capabilities of the two agencies. An integrated MIS is essential to effective case tracking for the new vertical prosecution system.

■ ***Continued enforcement of the vigorous new "zero tolerance" policies on records procurement and investigative interviews***. MBC and HQE have begun to establish a new industry norm of prompt cooperation with the lawful demands of the disciplinary program. Using the citation and fine sanction and other tools, this progress can be increased to yield proportional decreases in excessive case cycle times.

■ ***Greater use of expedited disciplinary tools in appropriate cases***. MBC and HQE should expand their use of ISO/TRO powers, Penal Code section 23 authority, and subpoena enforcement.

■ ***Adequate staffing for HQE, and increased HQE assistance for CCU***. MBC and HQE must come into compliance with Government Code sections 12529(c) ("[t]he Attorney General shall ensure that the Health Quality Enforcement Section is staffed with a sufficient number of experienced and able employees that are capable of handling the most complex and varied types of disciplinary actions"). MBC and HQE must also comply with Government Code section 12529.5(b) by ensuring that CCU is properly staffed with attorneys "to assist in the evaluation and screening of complaints from receipt through disposition and to assist in developing uniform standards and procedures for the handling of complaints and investigations." Both MBC and HQE agree that the assistance of a DAG in CCU is essential to assist not only with complaint disposition review but also with medical records procurement and mandatory reporting issues.

■ ***Improved insurer/employer reporting of malpractice payouts***. Insurer/employer compliance with the reporting requirements in Business and Professions Code sections 801, 801.1, and 803.2 has dramatically declined, and the absence of a penalty for failure to report surely encourages abuse and neglect. MBC and HQE should form a working group to review examples of noncompliance; draft statutory amendments to close loopholes; identify and educate mandated reporters at insurance companies and physician employers; and seek legislative action to add substantial penalties for noncompliance with Business and Professions Code sections 801, 801.1, 803.2, and 804.

■ ***Increased hourly rates for records review and report preparation by expert reviewers***. If funds are available, MBC should consider an increase in the hourly rate paid to MBC's experts for records review and report preparation. Increased compensation may aid in the recruitment of qualified experts — who are essential to the Board's ability to prove a quality of care case — and may prompt experts to review cases in a more timely fashion.

■ ***Evaluation of the costs and benefits of DMQ review***. The Medical Board should engage in an informed public discussion of the costs and value of DMQ review of ALJ decisions, together with the advantages and disadvantages of alternative models.

■ ***New procedure on requests for stay***. DMQ should adopt a regulation governing rulings on requests for a stay — which regulation ensures that a DMQ member or members rule on those requests, not MBC enforcement staff.

■ ***Disclosable misdemeanors list***. MBC and HQE should establish a task force to develop the list of disclosable misdemeanor criminal convictions required by Business and Professions Code section 2027(d).

■ ***Required notice to consumers regarding the Board's existence and disciplinary jurisdiction***. Consistent with the practice at many other California regulatory agencies, the Medical Board should require its licensees to provide their patients with some form of affirmative notice concerning the Board's existence, jurisdiction, toll-free complaint number, and Web site address. MBC's complaint intake has decreased over the past several years, and this may be due to inadequate public outreach.

■ ***Improved outreach and compliance efforts directed at mandated reporters***. MBC should continue its outreach efforts to individuals and institutions who are mandated reporters under Business and Professions Code section 800 *et seq*., as these reporters are valuable sources of complaints and reports that lead to detection, investigation, and disciplinary action in priority complaints under Business and Professions Code section 2220.05.

■ ***Resolution of longstanding policy issues affecting the Diversion Program***. These issues — listed in full at the end of Chapter XV — include the development of meaningful criteria for admission to and termination from the Program; identification and enforcement of consistent consequences for relapse; consideration of options for funding the Program to ensure that Program participation does not outstrip staff's ability to adequately monitor all participants; the development of standards, qualifications, and duties of "worksite monitors" and "hospital monitors"; reevaluation of the role, purpose, and functions of the Liaison Committee; the adoption of regulations defining standards for "evaluating physicians" and competency examinations for Program participants (as required by law); the ability of the Program — as currently staffed and structured — to monitor singly-diagnosed mentally ill physicians; and — importantly — the identification of the categories of information that should be included in quarterly "quality review reports" from staff to members of the Diversion Committee, to enable that Committee and DMQ to responsibly oversee the functioning of the Program as required by law.

The many process improvements now under way, and the important reforms coming soon as the result of SB 231 (Figueroa), point to a much brighter future for MBC and its disciplinary process. MBC's enforcement program has demonstrated strong new momentum and clear improvement, but further progress is needed for this agency to fully meet its vital public safety obligations.

The Monitor calls upon every stakeholder in the healthcare system — MBC, HQE, OAH, the Department of Consumer Affairs, the Legislature, organized medicine and the healthcare industry, physicians, and patients — to embrace the cause of a better Medical Board enforcement program. An ongoing collaborative effort to continue MBC's recent progress will result in greater protection for every Californian who relies on the healthcare system.

The Monitor team extends its thanks for the opportunity to serve, and its gratitude to all those who have joined with the Monitor in this good cause.